

AMENDED IN ASSEMBLY APRIL 9, 2007

CALIFORNIA LEGISLATURE—2007–08 REGULAR SESSION

ASSEMBLY BILL

No. 1261

Introduced by Assembly Member Caballero

February 23, 2007

An act to amend ~~Section 5956.6~~ of Sections 5956, 5956.1, 5956.2, 5956.3, 5956.4, 5956.5, 5956.6, 5956.7, 5956.8, 5956.9, and 5956.10 of, and to add Section 5956.11 to, the Government Code, relating to infrastructure financing.

LEGISLATIVE COUNSEL'S DIGEST

AB 1261, as amended, Caballero. Infrastructure financing.

Existing law permits a governmental agency to solicit proposals and enter into agreements with private entities for the design, construction, or reconstruction by, and may lease to, private entities, for specified types of fee-producing infrastructure projects. Existing law permits these agreements to provide for the lease of, or ownership of, infrastructure facilities owned by a governmental entity, but constructed by a private entity, to that private entity for a period of up to 35 years.

~~This bill would permit the agreement to provide for the lease of the facilities to, or ownership by, the private entity for up to 40 years.~~

This bill would authorize a local governmental agency, as defined, to enter into an agreement with a private entity for financing for specified types of revenue generating infrastructure projects. The bill would require an agreement entered into under these provisions to include adequate financial resources to perform the agreement, and would permit the agreements to lease, license, or provide other permitted uses by the governmental agency to extend for a term of up to 99 years, after which time the project would revert to the governmental agency.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 *SECTION 1. Section 5956 of the Government Code is amended*
2 *to read:*

3 5956. Local governmental agencies have experienced a
4 significant decrease in available tax revenues to fund necessary
5 infrastructure improvements. If local governmental agencies are
6 going to maintain the quality of life that this infrastructure provides,
7 they must find new funding sources. One source of new money is
8 private sector ~~investment capital~~ *financing or contributions* utilized
9 to *study, plan, design, develop, finance, construct, maintain,*
10 *improve, rebuild, repair, and operate, or any combination thereof,*
11 *infrastructure facilities. Private sector financing or contributions*
12 *may be used with public and private financing pursuant to this*
13 *chapter and projects may be financed by a combination of public*
14 *and private financing under this chapter. Private sector financing*
15 *or contributions for a project under this section may include, but*
16 *are not limited to, cash and cash equivalents, loans, capital*
17 *investment, in-kind contributions of materials or equipment,*
18 *construction or equipment financing, carrying of costs during*
19 *construction, private sector assumption of risk for operations,*
20 *performance, regulatory or environmental obligations or*
21 *compliance relating to the project, and any combination thereof.*
22 Unless private sector ~~investment capital~~ *financing or contributions,*
23 *expertise, or both,* becomes available to study, plan, design,
24 construct, develop, finance, maintain, rebuild, improve, repair, or
25 operate, or any combination thereof, fee-producing infrastructure
26 facilities, some local governmental agencies will be unable to
27 replace deteriorating infrastructure. Further, some local
28 governmental agencies will be unable to expand and build new
29 infrastructure facilities to serve the increasing population.

30 *SEC. 2. Section 5956.1 of the Government Code is amended*
31 *to read:*

32 5956.1. It is the intent of the Legislature that local governmental
33 agencies have the authority and flexibility to utilize private
34 ~~investment capital~~ *financing or contributions, public financing,*
35 *and any combination thereof, to study, plan, design, construct,*

1 develop, finance, maintain, rebuild, improve, repair, or operate,
 2 or any combination thereof, fee-producing infrastructure facilities.
 3 Without the ability to utilize ~~private sector investment capital~~ *these*
 4 *sources of financing or contributions*, to study, plan, design,
 5 construct, develop, finance, maintain, rebuild, improve, repair, or
 6 operate, or any combination thereof, fee-producing infrastructure
 7 facilities, the Legislature finds that some local governmental
 8 agencies will not be able to adequately, competently, or
 9 satisfactorily retrofit, reconstruct, repair, or replace existing
 10 infrastructure and will not be able to adequately, competently, or
 11 satisfactorily design and construct new infrastructure.

12 *SEC. 3. Section 5956.2 of the Government Code is amended*
 13 *to read:*

14 5956.2. It is the intent of the Legislature that this chapter be
 15 construed as creating a new and independent authority for local
 16 governmental agencies to utilize ~~private sector investment capital~~
 17 *financing or contributions, public financing, and any combination*
 18 *thereof*, to study, plan, design, construct, develop, finance,
 19 maintain, rebuild, improve, repair, or operate, or any combination
 20 thereof, fee-producing infrastructure facilities. To that end, this
 21 authority is intended to supplement and be independent of any
 22 existing authority and does not limit, replace, or detract from
 23 existing authority. This chapter may be used by local governmental
 24 entities when they deem it appropriate in the exercise of their
 25 discretion. It is the intent of the Legislature that this act create no
 26 new governmental entities.

27 *SEC. 4. Section 5956.3 of the Government Code is amended*
 28 *to read:*

29 5956.3. (a) For purposes of this chapter, “governmental
 30 agency” includes a city, county, city and county, including a
 31 chartered city or county, school district, community college district,
 32 public district, county board of education, joint powers authority,
 33 transportation commission or authority, or any other public or
 34 municipal corporation.

35 (b) For purposes of this chapter, “private entity” includes a
 36 person, business entity, combination of persons and business
 37 entities, or a combination of business entities.

38 (c) For purposes of this chapter, “fee-producing infrastructure
 39 project” or “fee-producing infrastructure facility” means the
 40 operation of the infrastructure project or facility will be paid for

1 *in whole or in part* by the persons or entities benefited by or
2 utilizing the project or facility.

3 *SEC. 5. Section 5956.4 of the Government Code is amended*
4 *to read:*

5 5956.4. A governmental agency may solicit proposals and enter
6 into agreements with private entities *as provided in this chapter*
7 ~~for the design, construction, or reconstruction by, and may lease~~
8 ~~to, private entities for~~ the following types of fee-producing
9 infrastructure projects:

- 10 (a) Irrigation.
- 11 (b) Drainage *and sanitary sewer systems*.
- 12 (c) Energy or power production, *power transmission and*
13 *distribution*.
- 14 (d) Water supply, treatment, and distribution.
- 15 (e) Flood control.
- 16 (f) Inland waterways.
- 17 (g) Harbors.
- 18 (h) Municipal improvements.
- 19 (i) Commuter and light rail.
- 20 (j) Highways or bridges.
- 21 (k) Tunnels.
- 22 (l) Airports and runways.
- 23 (m) Purification of water.
- 24 (n) Sewage treatment, disposal, and water recycling.
- 25 (o) Refuse disposal.
- 26 (p) Structures or buildings, except structures or buildings that
27 are to be utilized primarily for sporting or entertainment events.

28 *SEC. 6. Section 5956.5 of the Government Code is amended*
29 *to read:*

30 5956.5. Notwithstanding Chapter 10 (commencing with Section
31 4525) of Division 5, or Part 2 (commencing with Section 10100)
32 or Part 3 (commencing with Section 20100) of Division 2 of the
33 Public Contract Code, the governmental agency soliciting proposals
34 and entering into agreements with private entities for the studying,
35 planning, design, developing, financing, construction, maintenance,
36 rebuilding, improvement, repair, or operation, or any combination
37 thereof, by private entities for fee-producing infrastructure projects
38 shall ensure that the contractor is selected pursuant to a competitive
39 negotiation process. Projects may be proposed by the private entity
40 and selected by the governmental agency at the discretion of the

governmental agency. Projects may be proposed and selected individually or as part of a related or larger project. The competitive negotiation process shall utilize, as the primary selection criteria, the demonstrated competence and qualifications for the studying, planning, design, developing, financing, construction, maintenance, rebuilding, improvement, repair, or operation, or any combination thereof, of the facility of the private entity to perform the services required under the agreement. The selection criteria shall also ensure that the facility be operated at fair and reasonable prices to the user of the infrastructure facility services. The competitive negotiation process shall not require competitive bidding. The competitive negotiation process shall specifically prohibit practices that may result in unlawful activity including, but not limited to, rebates, kickbacks, or other unlawful consideration, and shall specifically prohibit governmental agency employees from participating in the selection process when those employees have a relationship with a person or business entity seeking a contract under this section that would subject those employees to the prohibition of Section 87100. Other than these criteria and applicable provisions related to providing security for the any required construction and completion of the facility, the governmental agency soliciting proposals is not subject to any other provisions of the Public Contract Code or, this code, or other code provisions that relates to public procurements.

SECTION 1.

SEC. 7. Section 5956.6 of the Government Code is amended to read:

5956.6. (a) For purposes of facilitating projects, the agreements specified in Section 5956.4 may include provisions for the lease, license, or permissive use of rights-of-way in, and airspace over, property owned by a governmental agency, for the granting of necessary easements, and for the issuance of permits or other authorizations to enable the private entity to construct infrastructure facilities supplemental to existing government-owned facilities. Infrastructure constructed by a private entity pursuant to this chapter shall, at all times, be owned by a governmental agency, unless the governmental agency, in its discretion, elects to provide for ownership of the facility by the private entity during the term of the agreement. The agreement shall may provide for the lease, license, or other permissive use of those facilities to, or ownership

1 by, the private entity for up to ~~40~~ 99 years. In consideration
2 therefor, the agreement shall provide for complete reversion of the
3 privately constructed facility to the governmental agency at the
4 expiration of the lease, *license, or other permissive use* at no charge
5 to the governmental agency. Subsequent to the expiration of the
6 lease ~~or ownership~~, *license, or other permissive use* period, the
7 governmental agency may continue to charge fees for use of the
8 infrastructure facility. If, after the expiration of the lease ~~or~~
9 ~~ownership~~, *license, or other permissive use* period, the
10 governmental agency continues to lease airspace rights to the
11 private entity, it shall do so at fair market value.

12 (b) The agreement between the governmental agency and the
13 private entity shall include, but need not be limited to, provisions
14 to ensure the following:

15 (1) Compliance with the California Environmental Quality Act
16 (Division 13 (commencing with Section 21000) of the Public
17 Resources Code). Neither the act of selecting a proposed project
18 or a private entity, nor the execution of an agreement with a private
19 entity, shall require prior compliance with the act. However,
20 appropriate compliance with the act shall thereafter occur before
21 project development commences.

22 (2) ~~Security for the construction of the facility to ensure its~~
23 ~~completion, performance of the agreement and contractual~~
24 ~~provisions that are necessary to protect the revenue streams of the~~
25 ~~project the funding and financial terms of the agreement.~~

26 (3) ~~Adequate financial resources of the private entity to design,~~
27 ~~build, and operate the facility, after the date of perform the~~
28 ~~agreement.~~

29 (4) Authority for the governmental agency to impose user fees,
30 *in whole or in part*, for use of the facility in an amount sufficient
31 to protect the revenue streams necessary for projects or facilities
32 undertaken pursuant to this chapter. User fee revenues, *used in*
33 *whole or in part, may be paid to the governmental agency or the*
34 *private entity and shall be dedicated exclusively to payment of the*
35 *private entity's and governmental agency's direct and indirect*
36 *capital outlay costs for the project, direct and indirect costs*
37 *associated with financing of the facility, including interest,*
38 *principal, repayment, issuance, and refinancing costs, direct and*
39 *indirect costs associated with operations, direct and indirect user*
40 *fee collection costs, direct and indirect costs of administration of*

1 the facility, ~~reimbursement for the~~ direct and indirect costs of
2 maintenance, *other project related costs*, and a ~~negotiated~~
3 reasonable return ~~on investment~~ to the private ~~entity as set forth~~
4 *specifically in the agreement, or included as part of the costs and*
5 *fees, as negotiated or determined during the procurement process.*

6 (5) As a precondition to the imposition or increase of a user fee,
7 the governmental agency shall conduct at least one public hearing
8 at which public testimony will be received regarding a proposed
9 user fee revenue or increase in user fee revenues. The public
10 hearing shall precede the action by the governmental agency to
11 actually impose a user fee or to increase an existing user fee. The
12 governmental agency shall consider the public testimony prior to
13 imposing a new or increased user fee. The governmental agency
14 shall provide the following notices and utilize the following
15 procedures:

16 (A) Notice of the date, time, and place of the meeting, including
17 a general explanation of the matter to be considered, shall be mailed
18 at least 14 days prior to the meeting to any interested party who
19 files a written request with the governmental agency for mailed
20 notice of the meeting on new or increased fees or service charges.
21 Any written request for mailed notices shall be valid for one year
22 from the date on which it is filed unless a renewal request is filed
23 prior to the expiration of the one-year period for which the written
24 request was filed. The legislative body may establish a reasonable
25 annual charge for sending notices based on the estimated cost of
26 providing the service.

27 (B) At least 10 days prior to the meeting, the governmental
28 agency shall make available to the public data that supports the
29 amount of the fee or the increase in the fee.

30 (C) (i) At least 10 days prior to the meeting, the governmental
31 agency shall publish a notice in a newspaper of general circulation
32 in that agency's jurisdiction stating the date, time, and place of the
33 meeting, including a general explanation of the matter to be
34 considered.

35 (ii) Any costs incurred by the governmental agency in
36 conducting the meeting or meetings required by this section may
37 be recovered from fees charged for the services that are the subject
38 of the fee.

39 (iii) For ~~transportation infrastructure projects specifically~~
40 authorized by this chapter, at least 10 days prior to the meeting,

1 the governmental agency shall publish for four consecutive times,
2 a notice in the newspaper of general circulation in the affected
3 area stating in no smaller than 10-point type a notice specifying
4 the subject of the hearing, the date, time, and place of the meeting,
5 and in at least 8-point type a general explanation of the matter to
6 be considered.

7 (D) No ~~local~~ governmental agency shall levy a new fee or
8 service charge or increase an existing fee or service charge to an
9 amount that exceeds the estimated amount required to provide the
10 service for which the fee or service charge is levied *costs for which*
11 *the user fee revenues are dedicated* and a reasonable rate of return
12 on investment, pursuant to paragraph (4). Any action by a ~~local~~
13 governmental agency to levy a new fee or service charge or to
14 approve an increase in an existing fee or service charge pursuant
15 to this chapter shall be taken only by ordinance or resolution. The
16 legislative body of a ~~local~~ governmental agency shall not delegate
17 the authority to adopt a new fee or service charge, or to increase
18 a fee or service charge.

19 (6) Require that if the legislative body of the governmental
20 agency determines that fees or service charges create revenues in
21 excess of the actual cost for which the user fee revenues are
22 dedicated and a reasonable rate of return ~~on investment~~, pursuant
23 to paragraph (4), those revenues shall either be applied to any
24 indebtedness incurred by the private entity *or the governmental*
25 *agency* with respect to the project, be paid into a reserve account
26 in order to offset future operation costs, be paid into the appropriate
27 government account, be used to reduce the user fee or service
28 charge creating the excess, or a combination of these sources.

29 (7) ~~Require~~ *If the private entity operates the facility, require*
30 *the private entity to maintain the facility in good operating*
31 *condition at all times, including the time the facility reverts to the*
32 *governmental agency.*

33 (8) Preparation by the private ~~entity~~ *entity's capital investment*
34 *of an annual audited report accounting for the income received*
35 *and expenses to operate the facility. The private entity shall make*
36 *that report available to any member of the public for a cost not to*
37 *exceed the cost of reproduction of the report.*

38 (9) Provision for a buyout of the private entity by the
39 governmental entity in the event of termination or default before
40 the end of the lease term.

1 (10) Provision for appropriate indemnity promises between the
2 governmental agency and the private entity.

3 (11) Provision requiring the private entity to maintain insurance
4 with those coverages and in those amounts that the governmental
5 agency deems appropriate.

6 (12) In the event of a dispute between the governmental agency
7 and the private entity, both parties shall be entitled to all available
8 legal or equitable remedies.

9 *SEC. 8. Section 5956.7 of the Government Code is amended*
10 *to read:*

11 5956.7. (a) The governmental agency may exercise any power
12 possessed by it with respect to the development and construction
13 of infrastructure projects pursuant to this chapter. Agreements for
14 the maintenance and ~~police~~ *operation of* services entered into
15 pursuant to this chapter shall provide for full reimbursement for
16 services rendered by the governmental agency in accordance with
17 the terms and conditions specified in the agreement. The
18 governmental agency may provide services for which it is
19 reimbursed with respect to preliminary planning, environmental
20 certification, and preliminary design of the infrastructure projects.
21 The governmental agency may consult with legal, financial, and
22 other consultants in the negotiation and development of the
23 agreement. To the extent existing public utility infrastructure is
24 necessarily required to be modified, relocated, or removed in order
25 for an infrastructure project authorized by this chapter to be
26 constructed, the cost of modification, relocation, or removal of the
27 existing infrastructure shall be borne by the private entity and
28 included as a recoverable capital cost of the project. This cost shall
29 not be construed to include costs of increasing the capacity, or
30 upgrading, or improving the existing public utility infrastructure.

31 (b) The private entity's responsibility to modify, relocate, or
32 remove existing public utility infrastructure shall not alter any
33 agreements that may be in place between the governmental agency
34 and any public utility regarding projects funded by the
35 governmental agency.

36 (c) In the event of a dispute regarding the reimbursement
37 required, a private entity may request an audit of the public utility's
38 costs by a mutually acceptable certified public accountant. The
39 result of the audit shall determine the actual costs. If the audit
40 indicates that the public utility's actual costs were less than 95

1 percent of the cost claimed, the cost of the audit shall be borne by
2 the public utility. If the audit indicates that the public utility's
3 actual costs were 95 percent or more of the cost claimed, the cost
4 of the audit shall be borne by the private entity.

5 *SEC. 9. Section 5956.8 of the Government Code is amended*
6 *to read:*

7 5956.8. The plans and specifications for each project
8 constructed pursuant to this chapter shall comply with all applicable
9 governmental design standards for that particular infrastructure
10 project. The private entity ~~designing, constructing, operating, and~~
11 ~~maintaining infrastructure facilities pursuant to this chapter~~
12 *performing the agreement* shall utilize private sector design and
13 construction firms to design and construct the infrastructure
14 facilities. However, a facility subject to this chapter and leased,
15 *licensed, or permitted* to a private entity shall, during the term of
16 the lease, *license, or permit*, be deemed to be public property for
17 purposes of identification, maintenance, enforcement of laws and
18 for purposes of Division 3.6 (commencing with Section 810). All
19 public works constructed pursuant to this chapter shall comply
20 with Chapter 1 (commencing with Section 1720) of Part 7 of
21 Division 2 of the Labor Code.

22 *SEC. 10. Section 5956.9 of the Government Code is amended*
23 *to read:*

24 5956.9. In order to use the authority conferred by this chapter
25 to the maximum extent, a governmental agency may use private
26 infrastructure financing pursuant to this chapter as the exclusive
27 *funding or* revenue source or as a supplemental *funding or* revenue
28 source with federal or local funds. The governmental agency
29 involved may be a local governmental agency or a combination
30 of local governmental agencies. The governmental agency may
31 work cooperatively with the California Infrastructure and Economic
32 Development Board with regard to the design, construction,
33 operation, and financing of privately financed facilities, but the
34 projects will not be subject to the review or approval of that board.

35 *SEC. 11. Section 5956.10 of the Government Code is amended*
36 *to read:*

37 5956.10. Notwithstanding any provision of this chapter, neither
38 the state ~~or~~ nor any state agency may directly or indirectly use the
39 authority in this chapter, nor may any governmental agency as
40 defined in Section 5956.3, use the authority in this chapter, to

1 design, construct, finance, or operate a state project. For purposes
2 of this section, a state project includes any of the following:

- 3 (a) Toll roads on state highways.
- 4 (b) State water projects.
- 5 (c) State park and recreation projects.
- 6 (d) State financed projects.

7 These limitations shall not prohibit the state, any state agency,
8 or any governmental agency as defined in Section 5956.3, from
9 utilizing authorizations contained in other provisions of law.

10 *This section shall not be construed to prohibit a governmental*
11 *agency, as defined in subdivision (a) of Section 5956.3, from using*
12 *this chapter to accomplish projects that are not expressly*
13 *prohibited in this section.*

14 *SEC. 12. Section 5956.11 is added to the Government Code,*
15 *to read:*

16 *5956.11. The governmental agency may determine the validity*
17 *of any permits, authorizations or approvals, contracts and*
18 *agreements, user fees, and other actions taken pursuant to this*
19 *chapter, by initiating a validating proceeding, as provided in*
20 *Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of*
21 *the Code of Civil Procedure. The validating action may also be*
22 *initiated by interested person as provided in Chapter 9*
23 *(commencing with Section 860) of Title 10 of Part 2 of the Code*
24 *of Civil Procedure.*